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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/574,231

08/31/2006

Ulrike Schulz

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EXAMINER

LEA, CHRISTOPHER RAYMOND

ART UNIT

PAPER NUMBER

1613

NOTIFICATION DATE

DELIVERY MODE

05/04/2011

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

gbpatent@gbpatent.com
pto@gbpatent.com

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/574,231

Applicant(s)

SCHULZ ET AL.

Examiner

Christopher R. Lea

Art Unit

1613

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 15 April 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/C. R. L./
Examiner, Art Unit 1613

/Ernst V Arnold/
Primary Examiner, Art Unit 1613

Continuation of 11. does NOT place the application in condition for allowance because: Applicant has not amended the claims or otherwise submitted evidence that need be entered; therefore, nothing has been entered and applicant's arguments alone are considered. As a large part of applicant's arguments are repeated from the response prior to the final rejection, the examiner herein incorporates his arguments from the final rejection by reference.

The two main arguments of applicant with respect to the Williams rejection are that 1) the Williams reference does not meet the limitation "(a), (b), and (c) being present in ratios which result in gelling" and 2) the meaning on the phrase "result in". As to 1), the examiner again points out that applicant has not provided evidence that the ratios taught by Williams do not "result in gelling". Applicant argues that the examiner has not met the criteria for shifting the burden for this showing to applicant. The examiner disagrees. "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Clearly, since the claimed and prior art compositions contain the same claimed ingredients and the prior art composition is in the form of a gel, there is "sound basis for believing that the products of the applicant and the prior art are the same", especially as nowhere in the specification does applicant even begin to outline the boundaries for the ratios "which result in gelling". Applicant's arguments concerning why each ingredient in the composition of Williams is present is not relevant to whether or not the products are the same. As to 2), the applicant wishes the examiner to interpret "which results in gelling" as "which forms a gel even in the absence of a separate gelling agent". As the examiner is required to give the claim terms their broadest reasonable interpretation consistent with the specification, to narrowly interpret this limitation as applicant desires would be improper. The examiner notes that applicant's representative declines to debate him on the "philosophical" nature of causation; however, applicant persists in equating "results in" and "causes" despite examiner's best attempt to illustrate their differences. Whether one is of ordinary skill in the art or not, words have meaning and to ignore even the most subtle difference in the meaning of two words is to practice neither good philosophy nor good science. Additionally, the examiner wishes to note that applicant appears to be ignoring the fact that "gel" as a verb means "to thicken". In fact, applicant's own specification does not say that the combination of water, an alpha-hydroxycarboxylic acid, and antiperspirant ingredient forms a gel but rather "gels to afford a transparent, viscous to pasty formulation" (lines 10-15 of page 3 in the specification, [0014] of the published application). In this sense, the limitation actually only requires that the ratios of (a), (b), & (c) be such that the composition thickens when the ingredients are combined. Certainly, applicant has not presented any evidence to show that the composition of Williams does not thicken. Additionally, the instant claim language is open and does not exclude gelling agents. For all these reasons, the examiner concludes that a preponderance of the evidence still lies on the side against the novelty of applicant's claims, and the anticipation rejection is maintained.

Applicant argues with respect to the rejections based on Guskey, Bhakoo and Hei that 1) Guskey discourages the use of water, 2) that Guskey does not motivate the concurrent use of mandelic acid and antiperspirant actives and 3) Hei does not teach a more than temporary contact with human skin. As to 1), the examiner reminds applicant that "get" when used as a verb means "to thicken" not "independently form a gel" as applicant desires. The examiner further reminds applicant that there is no evidence on the record to support applicant's assertion that the ratios taught by Guskey (even with limited amount of water that Guskey suggests) does not result in thickening. As to 2), while it is true that Guskey does not teach the concurrent use of an antiperspirant and mandelic acid (or even an exfoliant), the rejection is not solely based on Guskey. The examiner believes that the combined teachings of Bhakoo that deodorants work through antimicrobial action and of Hei that mandelic acid has antimicrobial properties motivates on of ordinary skill in the art to use mandelic acid as a deodorant. In this sense, the fact that Guskey teaches mandelic acid as an exfoliant is insignificant except that Guskey does not teach away from the combination of an exfoliant and antiperspirant. Applicant argues that "someone using an antiperspirant composition on the skin (e.g., in the armpits) does not usually wish the skin to exfoliate there, and neither will someone be interested in an exfoliant having antiperspirant properties." This assertion is opinion and relies on an intended use (application to the armpit) which is neither claimed nor even discussed in the instant application. Deodorant and antiperspirant compositions are not limited to armpit application nor are they limited to long term applications, however desirable those features may be. Additionally, applicant asserts that exfoliants are only applied for a short period of time, but again this is opinion and not evidence. As to 3) applicant acknowledges that Hei teaches application of the compositions for treating athlete's foot or for use in hand soap and pre- & post-surgical scrubs. The examiner finds it curious that applicant omitted the words "deodorizers" from the list of uses cited by the examiner and chose to insert "only" in the examiner's explanation that athlete's foot is a disease that affects humans. Applicant wishes to read athlete's foot fungus to be limited to animal infections from said fungus. The examiner finds this reading too narrow, especially in light of the previous paragraph in Hei that include hand-soap (something which applicant must admit no animal uses) among the possible uses. Applicant again argues that temporary application of the composition teaches away, but again the examiner finds no limitation in the claims that requires the deodorizing composition to be applied for long periods of time. The expected result remains the same; a transparent deodorant/antiperspirant composition is made in the absence of evidence to the contrary. No unexpected results have been presented. Applicant's arguments are not persuasive, and the rejection under 35 U.S.C. §103(a) is maintained.

Applicant does not argue the merits of the double patenting rejection and requests that the provisional rejections be held in abeyance until allowable subject matter is indicated. As such, the double patenting rejections are maintained